

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CASE NO. 4:08-cv-00324-RH-WCS

FLORIDA WILDLIFE FEDERATION, INC.;
SIERRA CLUB, INC.; CONSERVANCY OF
SOUTHWEST FLORIDA, INC.;
ENVIRONMENT CONFEDERATION OF
SOUTHWEST FLORIDA, INC.; and
ST. JOHNS RIVERKEEPER, INC;

Plaintiffs,

vs.

LISA P. JACKSON, Administrator of the
United States Environmental Protection
Agency; and the UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY,

Defendants,

FLORIDA PULP AND PAPER
ASSOCIATION ENVIRONMENTAL
AFFAIRS, INC., the FLORIDA FARM
BUREAU FEDERATION, SOUTHEAST
MILK, INC., FLORIDA CITRUS MUTUAL,
INC., FLORIDA FRUIT AND VEGETABLE
ASSOCIATION, AMERICAN FARM
BUREAU FEDERATION, FLORIDA
STORMWATER ASSOCIATION, FLORIDA
CATTLEMAN'S ASSOCIATION, and
FLORIDA ENGINEERING SOCIETY,

Intervenor-Defendants,

and

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,

Intervenor-Defendant. /

**EPA'S RESPONSE TO
PLAINTIFF'S MOTION
FOR STAY**

Defendants the United States Environmental Protection Agency and Lisa P. Jackson, Administrator (collectively "EPA") hereby respond to Plaintiffs' Motion for Stay (Doc. #71).

1. At the April 2, 2009 hearing on cross motions for summary judgment, the Court stated that Plaintiffs' claims of a 1998 determination pursuant to Clean Water Act Section 303(c)(4)(B), 33 U.S.C. § 1313(c)(4)(B), are substantially academic in light of the January 14, 2009 Section 303(c)(4)(B) determination by EPA's Assistant Administrator. Exhibit 1, Transcript at 27.

2. Also at the hearing on cross motions for summary judgment, the Court asked Plaintiffs' counsel the following: "Why not write your letter, if you haven't already done so, and then amend your complaint to include a count under the January 14, 2009 letter, and ask for an injunction telling them to act more promptly?" Exhibit 1 at 24-25.

3. Plaintiffs initially stated no interest in seeking leave to amend their complaint, but have since reconsidered, having served on EPA a sixty-day notice of intent to commence an action under the Clean Water Act's citizen suit provision based on the January 14, 2009 determination and filing the pending motion for stay.

4. Plaintiffs are correct that EPA counsel stated at the hearing that EPA would not oppose Plaintiffs' motion for leave to amend the complaint to add a new claim, Exhibit 1 at 46, but reserved the right to argue as to the justiciability of any claim that would be based on the January 14, 2009 determination. Exhibit 1 at 50-51.

5. Plaintiffs' Motion for Stay states that Plaintiffs intend to seek leave to file an amended complaint that would "add a citizen suit based on" the January 14, 2009 determination. Doc. #71 at ¶ 7.

6. The sixty day notice letter, dated April 9, 2009, states that:

The 2009 Grumbles letter is a ratification and confirmation of EPA's finding in 1998 that numeric nutrient criteria were needed throughout the United States including Florida. As a ratification of the original 1998 determination that numeric nutrient criteria standards were necessary and that states that failed to adopt numeric nutrient criteria would have standards promulgated for them by EPA, the Grumbles letter, as a matter of law, causes EPA's obligation to promptly prepare and publish numeric water quality standards for Florida to be binding as of the original determination of 1998. As EPA has admitted that it has failed to act promptly should the 1998 determination be a binding 303(c)(4)(B) determination, the undersigned would be entitled as a matter of law to an injunction requiring EPA to promptly propose numeric nutrient standards for Florida.

Doc. #74 (Response of Intervenor South Florida Water Management District to Motion to Stay), Exhibit 1 at 4.

7. From the sixty day notice, it appears that Plaintiffs view the January 14, 2009 determination as a confirmation of what they allege is an earlier determination in 1998. Based on this characterization, the January 14, 2009 determination would serve to provide an additional basis for considering the 1998 Clean Water Action Plan to be a determination, and would thus provide additional argument for why Plaintiffs believe EPA has not met its obligation to promptly propose new or revised water quality standards based on the alleged 1998 determination. To the extent this is Plaintiffs' intended characterization, EPA would oppose a stay, on the ground that this characterization merely restates the basis for the claims in Plaintiffs' Second Amended Complaint.

8. However, to the extent Plaintiffs are seeking leave to file a separate claim relating solely to the January 14, 2009 determination, pleading in the alternative to their existing claims regarding the 1998 Clean Water Action Plan, EPA does not oppose a stay to allow for notice to the Agency.

Respectfully submitted,

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Dated: April 27, 2009

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a true and correct copy of the foregoing to be electronically filed on April 27, 2009. The following counsel are to receive notice of the filing via the Court's electronic case filing system:

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and

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Intervenor-Defendant.

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1 P R O C E E D I N G S

2 *(Call to Order of the Court.)*

3 THE COURT: Good morning. Please be seated.

4 We're here on cross-motions for summary judgment, but
5 it's the plaintiff's case. Unless you have agreed on
6 something different, let me hear from the plaintiffs first.

7 MR. GUEST: Thank you, Your Honor.

8 THE COURT: Mr. Guest?

9 MR. GUEST: Your Honor, let me see if I can summarize
10 our case by placing the Clean Water Action Plan document that
11 we say is the determination in context.

12 What happened was, of course, as you recall, I'm
13 sure, that this is a mandatory 303(c)(4)(B) case.

14 THE COURT: And if it helps you, I can tell you, I've
15 read all of the briefs and a fair part of the record; I think
16 all the important parts of the record, so --

17 MR. GUEST: I had guessed that, Your Honor. So, let
18 me just say what we think are the important points in it.

19 Where this process began was in 1992, 17 years ago;
20 and what happened was -- here, I'm referring to Exhibit 13 to
21 your summary judgment motion -- was that EPA was required to
22 do a report to the Congress on the quality of the nation's
23 waters. This is required by Section 305(b) of the Act.

24 And what happened in that -- what it says in that
25 document was that the Congress was entertaining, in the

1 reauthorization of the Act, the idea of requiring numeric
2 nutrient standards; and so -- and EPA, the document says, that
3 EPA wanted more flexibility than that; and that triggered this
4 undertaking that ultimately ripened into a determination.

5 What this document shows was that 37 percent of the
6 river miles that had been assessed in the United States were
7 impaired for nutrients; 40 percent of the lake square miles,
8 lake acres, that had been assessed in the United States were
9 impaired for nutrients; and 55 percent of the estuarine
10 acreage were similarly impaired; that it was the second
11 leading cause for pollution for lakes and rivers, and the
12 primary cause of pollution in estuaries. And that triggered a
13 process to deal with the problem.

14 In 1993 there was an internal EPA assessment, and
15 that's at Administrative Record 49; and it was a meeting with
16 about 30 attendees to scope out the problem.

17 That ripened in July of 1993 into an EPA nutrient
18 task force that was created.

19 In the end of 1994 -- this is Administrative Record
20 19 -- by the way, I think the numbering system is
21 Administrative Record, and then AR-2 and AR-3. So, when I say
22 "AR," I really mean AR-1.

23 THE COURT: Okay.

24 MR. GUEST: So, there is a status report, and what
25 that did was it summarized the state water quality standards

1 for all states, including Florida, and it summarized the
2 problems -- 37 percent, 40 percent, 55 percent -- and found
3 that the way the state standards, the criteria for dealing
4 with nutrients, was mostly there, may not even be there at
5 all.

6 So, then what happened, in the following year,
7 1995 -- this is Administrative Record 40 -- there was a
8 national nutrient assessment workshop. The recommendation
9 that came out of that was to establish ecoregions, ended up
10 with 14, and the idea was to use that as a way of setting
11 guidelines for numeric nutrient criteria.

12 Administrative Record 98 shows that, over the course
13 of the following two years, there developed a national
14 nutrient plan to kind of try to deal with these things.

15 So, this thing had been underway for five years in
16 1997. And what happened then was the Vice President, in
17 furtherance of a national policy by the President -- this is
18 now, of course, the 25th anniversary of the Act -- and the
19 finding is, "Well, you know, the idea was we're supposed to
20 make all of the waters in the United States
21 fishable/swimmable, that was the standard; and 25 years later,
22 we haven't made it."

23 And so he sends out a memo, and it says, "We need to
24 figure out how we're going to get there. We need a national
25 plan to get to fishable/swimmable." So, he assigns to the EPA

1 administrator and the agriculture secretary the task of
2 heading this project to have a Clean Water Action Plan.

3 Well, of course, the fishable/swimmable objective is
4 a Clean Water Act objective, and the EPA administrator is
5 administering the implementation of the Clean Water Act.

6 And what ultimately was produced was the Clean Water
7 Action Plan, which was forwarded to the Vice President with a
8 letter bearing the signature of the EPA administrator. This
9 was an act of the administrator. It also bears the signature
10 of the secretary of agriculture; but we submit, of course,
11 that that does not diminish the fact that it was an act of the
12 EPA administrator, because we have the Clean Water Act and the
13 actions contemplated in this key action were, of course, EPA
14 actions.

15 The index is useful, because it kind of sets out the
16 big picture. I'm going to, if I might, share with you the
17 portion of the Clean Water Action Plan, Administrative Record
18 24. It's just a three-page excerpt, which, we submit,
19 contains the core components here.

20 MS. REIMER: May I approach, Your Honor?

21 THE COURT: Yes.

22 Thank you.

23 MR. GUEST: And the first page is the index page, and
24 Roman II is, "Actions to Strengthen Core Clean Water
25 Programs"; within that, the third subcategory is "Strong

1 Polluted Runoff Controls"; and within that, then the next
2 subcategory is "Reduce Nutrient Over-Enrichment." This is
3 Administration Record 24.

4 Now, the big picture of this document is that the
5 Vice President's memo had asked for a comprehensive plan to
6 get us to fishable/swimmable. So, we have, you know, a large
7 number, approaching a hundred, of key actions in here. Most
8 of those key actions are things like funding programs, money
9 matters, fact databases, uniform reporting systems, uniform
10 monitoring systems, uniform method of scientific testing, you
11 know, for mercury in fish, and things like that, that kind of
12 thing. So, it was a wide variety of different key actions.

13 This nutrient plan was pulled in quite naturally into
14 the Clean Water Action Plan and became a key action. And the
15 key action is in the pages that I shared with the parties and
16 the court, beginning on page 58, where it reads, "*Define*
17 *Nutrient Reduction Goals*," and it says in the first paragraph
18 that "*The assessment of the seriousness and extent of the*
19 *problem is often based on subjective criteria...*"

20 And why that's important -- why that's an important
21 finding is really going to the core of this case. Because
22 this is like having a speed limit sign, the nutrient water
23 quality standards are like speed limit signs, and to have a
24 subjective criteria is like having a speed limit on a highway
25 that says, "Don't drive any faster than the weather, lighting,

1 and traffic conditions under the circumstances would make it
2 unsafe," and include perhaps a margin of variance of that,
3 too. That is an utterly meaningless and unenforceable
4 standard compared to what you see on the highway, which says
5 55 miles per hour.

6 That's the problem, and that's the problem identified
7 in the document.

8 And it says then, in the following paragraph,
9 *"Specifically, EPA will develop nutrient criteria -- numerical*
10 *ranges for acceptable levels of nutrients."*

11 The speed limit sign with a number on it. That's the
12 issue.

13 And then in the following paragraph it says -- now,
14 this is pulling in the work that had been done before -- *"EPA*
15 *will develop nutrient criteria for the various water body*
16 *types and ecoregions..."*

17 And so we ended up with 14 ecoregions, and you have
18 lakes and rivers.

19 THE COURT: If you were setting out broad strategy
20 goals and not making any determination and you wanted to say,
21 "What we plan to do, Mr. Vice President, is assess this work
22 on this, but where we want to get to is that we want to get to
23 numeric nutrient standards," one way, I suppose, you could say
24 that is, "EPA will develop numeric guidelines." How else
25 would you say it?

1 MR. GUEST: Well, I think --

2 THE COURT: Isn't that exactly the language you would
3 use to set forth a broad policy goal without making a
4 determination?

5 MR. GUEST: Well, I think the answer is, I think, no.
6 I think, if you look at the rest of the Clean Water Action
7 Plan, I mean, you have sort of broad planning generalizations,
8 and I think this is different than that. In fact, there are
9 two specific things, two specific key actions, that really
10 fall into the category of not just general planning ideas, but
11 specific determinations.

12 This was one of them, and what it says -- it doesn't
13 say, you know, key planning intention; it says key action. It
14 doesn't say, EPA intends to, EPA plans to; it says EPA will
15 establish.

16 THE COURT: I understand, but I guess that was my
17 question. What do you think, when it says EPA intends to --
18 I've had the misfortune to be on long-range planning projects,
19 and it seems to me that what comes out is language just like
20 this, this is what we will do.

21 MR. GUEST: Okay. I think that the way of answering
22 that question is the context of how this was implemented. Was
23 this just a plan? Was this sort of a plan, being almost a
24 subset of an intention? Or was it a specific determination
25 with a deadline that says you have to?

1 And, obviously, by your question, you clearly have
2 read the key action, which is outlined up there. It says EPA
3 will, by a particular date, 2000, set the criteria, and then
4 it says -- they will assist them. And then it says, "*If the*
5 *state does not adopt the standard, EPA will begin the*
6 *process.*" It's an "if they don't, we will"; and I think
7 that's more than planning. I think that's a deadline idea.

8 And that conclusion is reinforced by how the numeric
9 nutrient strategy document put -- this was in the Federal
10 Register as a hotlink, by the way.

11 THE COURT: I understand what you're saying. I guess
12 partly what I'm asking is, what is there that's inconsistent
13 with the following assessment, one possible assessment of what
14 was happening:

15 There's been the background work that you're talking
16 about. People are talking about numeric nutrient standards.
17 It's obvious -- it seems to me it should have been obvious to
18 anybody that cared about these things that there was a
19 nutrient problem, and a way to deal with it was numeric
20 standards. This is what's on the horizon. And the Vice
21 President says, "Let's look across the board. We've got a
22 ways to go to get to where we're trying to get to." And one
23 of the things that comes back is numeric nutrient standards.

24 And so here's our long-range plan, if you will. The
25 long-range plan is, within three years, we're going to develop

1 some numeric criteria under our 304 authority. And then the
2 states, of course, they have to make triangular reviews; they
3 are going to have to be submitting things. And so by that
4 point they are going to have to have numeric standards. And,
5 if they don't, we're going to disapprove their standards.

6 And then, of course, what happens when EPA
7 disapproves their standards is the EPA promulgates standards,
8 and the states either have 60 or 90 days -- I suppose it's
9 90 -- the states have 90 days to take it back over and
10 promulgate their own standards, or the EPA's standards go into
11 effect.

12 So, if what they were doing was to say, "Look, we're
13 not there yet; but we plan to get there over the next two or
14 three years, we're going to have numeric standards; and then,
15 of course, the states will have to do them or we will."

16 I'm trying to see what it is that would be different.
17 What would they say differently in this document than that?

18 MR. GUEST: I think the short answer to that is that,
19 it's the distinction between (c) (4) (A), 303, and (c) (4) (B),
20 that's the difference.

21 And so in (c) (4) (A), the state, on its own
22 initiative, submits a water quality standard to EPA; and EPA
23 goes through the process that you've described. EPA approves,
24 disapproves. And, if they disapprove and the state doesn't
25 fix it, then EPA does it on its own. That's a (c) (4) (A)

1 process that you've described.

2 THE COURT: I understand it's two different
3 processes. I guess my question is:

4 What makes you say it's the one and not the other?

5 MR. GUEST: Well, because in this case, EPA is doing
6 the initiation, because if this was an (A) process, then under
7 the (A) process, the state on its own submits it to EPA; EPA
8 says yes or no, and this is what we're going to do.

9 In the (B) process, EPA says, "We need to do this,
10 and this is going to be what it is."

11 So, the question is, which entity initiates. That's
12 the ultimate issue. Is it the state that initiates it, or is
13 it the EPA? That's how you tell the difference between (A)
14 and (B).

15 And this was, obviously, (B), because what it says is
16 EPA will. It doesn't say the states will.

17 Now, I certainly recognize the point that you're
18 making, which is that there is a bleed in the way they're
19 approaching this thing, because if it was, I suppose, a
20 thoroughbred (B), what would happen is EPA says, "We're going
21 to do it," like they did in -- you know, well, they would just
22 say, "We're just going to do it," and then promulgate it.
23 Instead, what they did was they gave the states grace. They
24 applied kind of an (A) procedure, but it was still EPA that
25 initiated it.

1 And not only did they initiate it, they set
2 deadlines. And, if you look at how this was applied by the
3 agency, this document here, which is Administrative Record 1,
4 this is a table of the numeric nutrient strategy that
5 summarizes it. What happens is, this is how the agency --

6 I'm going to bring you two documents on how the
7 agency interpreted it.

8 And what -- this is a summary, and what it basically
9 says is, "We're going to have ecoregions." We have four
10 categories of water bodies, and you've got your 14 ecoregions.
11 And then you have at the end, promulgation if the states take
12 no action.

13 Well, that's not the states submitting; that's not
14 the (A) process; this is the (B) process, where the action is
15 initiated by EPA.

16 That inference is further buttressed by how the
17 Region 4 nutrient coordinator applied this thing, and that's
18 at Administrative Record 3, page 18, and this is a
19 presentation by Ed Decker. And what it says is that we have a
20 time clock; the time clock has started; we have a deadline,
21 and it says, "*Water quality standards adopted by*
22 *December 2004.*"

23 THE COURT: I guess I need to back up and make sure I
24 follow what you're calling the (A) and (B) process. Let me
25 describe how I was approaching it, which may show my

1 confusion, and you can straighten me out.

2 I was distinguishing 303 and 304, where 303 has the
3 determination made by the administrator; and then 304 is the
4 process going with a particular state, where they have their
5 standards, they submit them for EPA approval; they're approved
6 or not; and, if not, then the EPA issues the criteria.

7 Now there's, obviously, some relation between 303 and
8 304. They are not dealing with the same subject matter. But
9 the fact that standards are being assessed under 304, seems to
10 me not an indication that the administrator made a
11 determination under 303. The 304 process can go forward, and
12 does routinely, without a 303 determination.

13 MR. GUEST: Well, but I don't think it goes forward
14 with this deadline requirement. I think that's the
15 distinction, is that the way it was applied by the agency, it
16 was -- it had specific deadlines in the form of, if "You
17 don't, we will." And that's what the document I just handed
18 you said. It's that. Here's like the second page of that
19 document, which I just handed to you, page 10 that says, "*EPA*
20 *deadlines for criteria.*"

21 *(Ms. Reimer confers with Mr. Guest.)*

22 I'm sorry. Ms. Reimer just shared with me the
23 insight that I failed to share with the court.

24 THE COURT: All right.

25 MR. GUEST: Thank you.

1 The 304 process is the process by which EPA
2 establishes guidelines. This is your sort of starter kit for
3 when --

4 THE COURT: Okay. All right. I may not -- just
5 wait, Ms. Mann. He will get me straightened out. If he
6 doesn't, you can.

7 MS. MANN: Okay.

8 THE COURT: But just wait.

9 304 are the guidelines. I'm sorry. Okay. So, the
10 (A) and (B) that you're talking about are two different
11 processes.

12 MR. GUEST: Yes. So, the (A) process, the states
13 starts out saying, "Here's what we want to do," and EPA says
14 aye nor nay, and here's how you fix it, to the state; and if
15 the state doesn't fix it, then EPA has a duty to promulgate
16 within 90 days. So, that's the state-initiated process.

17 THE COURT: Okay.

18 MR. GUEST: And how you end up doing your standards
19 is the 304 guideline idea, but that's not what this is.

20 THE COURT: All right. I messed up my numbers. Now
21 I'm back with you and can follow you better.

22 MR. GUEST: So what happened here is that this was
23 initiated by EPA. That's how you know it's (B). It was
24 initiated by EPA and not by the states, and that's the
25 distinction between (A) and (B). (B) is when the EPA

1 administrator makes a determination, and (A) is when the state
2 submits a criteria.

3 The illustration of that is the Mississippi DEQ
4 versus EPA case, I guess the old Fifth Circuit case, about
5 1980, where the Mississippi DEQ says, "We want to do a
6 dissolved oxygen level of 4 milligrams per liter." The EPA
7 says, "That's too low. Fish can't make it on that." And
8 Mississippi wouldn't change. So, then EPA says in their 90
9 days, "Well, it's a five limit," and the state of Mississippi
10 sues and says, "You can't do that; it's arbitrary and
11 capricious," and the court says, "Well, that's how the statute
12 works."

13 That's the process. Mississippi says it's four; EPA
14 says, no, it should be five, or it's too low, or you can only
15 have a few, you know, variations from that. That's the
16 distinction.

17 And that's what this case is really about, is that it
18 was EPA that initiated this thing, and it was treated as a
19 deadline item. It was treated as a deadline item in the form
20 of "you must." That's what deadline means; it means "you
21 must." And when you say "you must," I don't think there is
22 any way you can reach an inference of anything other than that
23 there was a determination that you need to. That's what a
24 deadline means. It means you have to. And, if you have to,
25 that means that -- that necessarily means that there had been

1 a determination of it.

2 THE COURT: What do you make of the fact that they
3 put it three years in the future; or, for that matter, I
4 guess, five years in the future?

5 If it's (B), the obligation is to promptly publish
6 the regulations. Why can't somebody do a long-term plan, if
7 you will, and say, "Here's what we're moving toward; we're
8 moving toward numeric standards. There is going to come a
9 point where we think you're going to have to have numeric
10 standards"?

11 MR. GUEST: Well, the --

12 THE COURT: But, by the way -- suppose they come out
13 in 1998 and said, "Look, here's what we think. We think there
14 is going to come a point where we're going to need numeric
15 standards. You are going to have to assess your own state and
16 all of your water bodies, and maybe there will be exceptions
17 and maybe there will be other considerations; but, in general,
18 heads up, we think where we are going is numeric standards.
19 We are not making a determination under 303(B). We're not
20 creating any enforceable rights or obligations. We're just
21 telling you this is where we think we're going."

22 Can't do that?

23 MR. GUEST: Well, I think there is more than one
24 question in there, so let me answer each one separately.

25 I think, first of all, the document doesn't say,

1 "Here's where we're going." The document says, "These are the
2 deadlines." So, that's the first answer. It doesn't say,
3 "This is the direction we're heading." It says, "Here's
4 when."

5 I think the answer to the promptly issue has to be --
6 I think promptly varies with the circumstances, and that what
7 promptly was, was that it was going to take a couple of years
8 to come up with the ecoregion guidelines, but they did it in
9 two years. And, as you can see from the table, you know, it's
10 a pretty substantial piece of work, and so --

11 And then kind of a grace period for the states to,
12 you know, do something on their own, based on the guidelines,
13 and a deadline, if you don't get there. I think that that
14 falls within the ambit of promptly. So, that's that.

15 Now, on the question, the third item that I think was
16 embedded in your question, the disclaimer that accompanies the
17 strategy, that's the June 1998 in the Federal Register, it's
18 got --

19 THE COURT: Mine was meant to be hypothetical. There
20 is something like that in '98, I understand, in the strategy
21 document.

22 MR. GUEST: Well, it's the June item.

23 THE COURT: Right, the strategy document.

24 MR. GUEST: The June item says that.

25 But that disclaimer is not in the Clean Water Action

1 Plan. There is no such disclaimer there, and so -- and we
2 submit that this is the determination.

3 THE COURT: Is there anything that you think
4 indicates that anybody at EPA contemporaneously understood
5 this to be a 303(B) determination?

6 MR. GUEST: I would say, yes, that the -- outside of
7 the documents that I have cited to you, no. The short answer
8 is, outside of the documents, no.

9 But I think the way this really works, as a practical
10 matter, is that you kind of, you know, have an array, or maybe
11 I would say, perhaps, a chest of powers that the agency has to
12 approve, to disapprove, to fund various different programs.

13 So, when you look through that array of different
14 statutory powers, the only one that fits is -3(4)(B). That's
15 the only possible source of authority.

16 And that's what brought us to this case in the first
17 place, is that that is plainly what they're doing.

18 And now, and going back to the --

19 THE COURT: Let me follow up on that. That gets to
20 my earlier question that I asked inartfully, because I
21 confused the numbers in the sections.

22 If I understand what you just told me is that the
23 authority that the EPA had to do what it did in the plan was
24 its 303(B) authority.

25 MR. GUEST: Could only have been.

1 THE COURT: Why doesn't it have the authority to
2 accomplish what it said in the plan it intended to accomplish
3 by issuing guidelines under 304, reviewing state plans under
4 303(A), disapproving plans that don't have numeric nutrient
5 standards or that don't explain the absence of numeric
6 nutrient standards; and then, if a state doesn't come up with
7 a satisfactory standard, promulgating its own?

8 MR. GUEST: You don't have the authority to order
9 states to do anything under (A). All you can do is approve
10 it. All you can do is guidelines. I think that's the short
11 answer to that.

12 THE COURT: So, you think that, if the -- and the DC
13 circuit may say this, but -- you think that, if a state just
14 has inadequate standards and does nothing, that the EPA can't
15 review -- the state is obligated to have a triangular review.
16 So, the state does its triangular review and it has a
17 standard, and its standard is inadequate, but the state says,
18 "I'm not changing it," so the state does nothing. You think
19 the EPA then has no power to review that absence of action?

20 MR. GUEST: No. I think that they can say you have
21 to have a standard, or they can say the standard is
22 inadequate. That's what happened in the CORALations case.

23 THE COURT: Right. So, why are you telling me they
24 have no authority to deal with it? That's how they would deal
25 with it.

1 MR. GUEST: Well, but that's not what they did,
2 though, because what they did --

3 THE COURT: That gets back to the question what they
4 actually did. I understand, and that's the point of the
5 inquiry. But if I understood you, you've said, partly, you
6 know that they acted under 303(B), because that's the only way
7 they could do this.

8 MR. GUEST: That's correct.

9 THE COURT: So my question is -- well, I don't
10 understand that. Why can't they do it under 303(A)?

11 MR. GUEST: Well, they could have done it in a
12 triangular review process under 303(A). They could have.

13 THE COURT: Exactly. And it seems --

14 MR. GUEST: But they didn't.

15 THE COURT: -- that that deals nicely with the fact
16 that the state has three years.

17 MR. GUEST: Well, yeah, but --

18 THE COURT: It may just be a coincidence.

19 MR. GUEST: Well, but there isn't a single peep in
20 any of these documents that suggests that. In fact, if you
21 look at, for example --

22 THE COURT: No. The reference to 303(A), seems to
23 me, to be exactly the same as the reference to 303(B); it's
24 nonexistent. So, the fact that they don't cite 303(A), hardly
25 tells me that it must be 303(B). You might as well say that

1 they don't cite 303(B), so it has to be 303(A).

2 MR. GUEST: Well, no, because the context, the
3 context is that -- if what this plan -- now, here's -- I think
4 this really -- this inquiry really does get us somewhere,
5 because this key action could have said, "EPA, in each
6 triangular review, will examine whether or not there is a
7 numeric nutrient standard and whether it's adequate. And in
8 this process, if we find you're inadequate, we'll say, you
9 have to do something," and then, if they said that, then you
10 would know it was (A).

11 THE COURT: Exactly.

12 MR. GUEST: But it didn't.

13 THE COURT: Right, nor did it say (B).

14 MR. GUEST: Well, no, but what it did --

15 THE COURT: The truth is, if, in the context of this
16 80-whatever-page document that they've submitted in response
17 to the Vice President, if they had talked about nutrient
18 standards in 15 pages or 10 pages instead of a page and a
19 half, or whatever it is, maybe they would have told us the
20 answer. But it's a pretty abbreviated --

21 MR. GUEST: I think that what it's doing and the
22 problem with the abbreviation, is that there is a limit on how
23 long you can make these things.

24 THE COURT: Right.

25 MR. GUEST: And what was happening was that, as I

1 said earlier, this initiative had been underway since 1992,
2 and what had happened is that it got pulled in to the Clean
3 Water Action Plan as a way of coalescing and congealing where
4 the agency was going on various things. And what you actually
5 find in there is two items that I think qualifies
6 determinations. One of them deals with this, it says, "If you
7 don't, we will," with a deadline. And then the other -- this
8 is as to nutrients.

9 And there is another one that actually has a similar
10 history, which was biological agents, that being, you know,
11 bacteria, protozoa and viruses that were causing beach
12 closers, and things like that. There weren't any numeric
13 standards for those things, either. And there is another
14 finding in there that says we have to have these. It's in the
15 same form.

16 And that really stands out. Those things really
17 stand out as separate items from all of the other items in the
18 Clean Water Action Plan; because, you know, it's got a whole
19 bunch of things; it's got funding and monitoring and all of
20 these other things. And we submit that, just because it's in
21 with all of these other items, doesn't diminish its power and
22 effect as a determination.

23 THE COURT: There are a couple of questions I wanted
24 to ask you.

25 One, in the administrator's reply, they say that you

1 haven't argued that the schedule set forth in the January 14,
2 2009, letter is unreasonable. Taking a wild guess that
3 perhaps you think it's too long; but, since they've said you
4 hadn't argued that, I thought I would give you a chance to
5 address it.

6 MR. GUEST: Well, I would like to address all of that
7 together.

8 At the last hearing we had, counsel for the United
9 States acknowledged that, if a determination had been made in
10 1998, they had not complied with it promptly. And the relief
11 that we seek is an injunction, mandatory injunction, requiring
12 EPA to propose the default criteria, the guideline criteria,
13 immediately in a proposed rule, and then finalize the rule in
14 the 90 days.

15 That gives everybody a chance to be heard, gives EPA
16 a chance to say what they want. And, by proposing that
17 relief, I think we're answering the issue about whether that's
18 adequate or not.

19 THE COURT: So, you think they can go faster than
20 what the January 14th letter suggests.

21 MR. GUEST: That's what the default guidelines that
22 were --

23 THE COURT: Let me ask this, and I can guess at an
24 answer or two, but let me put it to you:

25 Why not write your letter, if you haven't already

1 done so, and then amend your complaint to include a count
2 under the January 14, 2009, letter, and ask for an injunction
3 telling them to act more promptly?

4 MR. GUEST: Because I think we, more or less -- well,
5 because we don't think the January 14th letter really does
6 anything.

7 THE COURT: Well, it's a determination.

8 MR. GUEST: It's a determination, but --

9 THE COURT: So now they have to act promptly.

10 MR. GUEST: Right, but, of course --

11 THE COURT: So, if the question is whether they have
12 to act promptly, now they're shooting fish in a barrel. They
13 have to act promptly. So, if you are right that two years is
14 too long, don't you win that lawsuit?

15 MR. GUEST: May I confer with my co-counsel before I
16 answer that question?

17 THE COURT: Sure. You probably want to turn that
18 microphone off. If the green button is on, the microphone is
19 on.

20 MS. REIMER: Thank you.

21 *(Mr. Guest and Ms. Reimer confer.)*

22 MR. GUEST: I think the answer to that is, first,
23 that the January 14th letter doesn't have anything but,
24 essentially, expectations in it. And so that sort of leads us
25 to a whole other --

1 THE COURT: What am I missing? If the January 14th is
2 not sufficient to be a determination, then there is no way
3 that the '98 plan is sufficient.

4 MR. GUEST: I'm not saying that it's not a
5 determination.

6 THE COURT: Okay. Well, if it is a determination,
7 then the law requires that they act promptly.

8 MR. GUEST: Yeah, but what ends up happening is
9 that --

10 THE COURT: If you can't win a case based on the
11 January 14th letter, you sure can't win a case based on the
12 1998 plan.

13 MR. GUEST: I agree that the January 14th letter was
14 calculated to sort of, you know, thread the needle as
15 perfectly as you can get it. There is no doubt about that. I
16 mean, you couldn't thread it more completely.

17 THE COURT: Sure. And so now they have to act
18 promptly; and, if you're right that two years is not
19 promptly -- and they can talk to me about why, after all of
20 these years, they need two more years, but -- if that's not
21 prompt, then you win a lawsuit saying they have to act more
22 promptly, right?

23 MR. GUEST: Yeah. But then we end up with, you know,
24 essentially, what amounts to another lawsuit, and I'm not --

25 THE COURT: No. I suggested you could amend your

1 complaint in this case. I mean, frankly, they say this case
2 is largely academic. Well, if --

3 MR. GUEST: I see your point.

4 THE COURT: It seems to me it's not technically moot,
5 because they haven't done it yet. But it's pretty academic,
6 it seems to me, if you're asking for action within 60 days and
7 maybe, you know, an amended complaint ought to take 60 more
8 days, maybe there is a difference of 60 or 90 days in there
9 somewhere; but, frankly, if prompt is six months, then I'm not
10 sure it really makes any difference at all.

11 But leave that aside. Maybe there is a difference in
12 what prompt is, depending on what they do and what my order
13 would require, so maybe there is a slight difference in time,
14 and, aside from that, of course, it's not academic, because
15 there are attorneys' fees, and we don't have the catalyst
16 theory anymore, so -- and that's part of my question. Is all
17 we're talking about are your fees, or is there some real
18 practical difference in this case?

19 MR. GUEST: No. We actually think there is a
20 practical difference.

21 THE COURT: I understand fees are not academic. It
22 is sometimes a very important question. So, I make light of
23 that, but is that all we're really talking about?

24 MR. GUEST: No, it's not only fees. No, it's not.
25 It's that we think that the relief we should be able to get is

1 what we said, is that to require them to promulgate the
2 guidelines as a proposed rule, and get that process underway
3 directly. So, the relief that you're talking about can be
4 considered.

5 THE COURT: Let's talk practicalities. I enter an
6 order, say, today, and that's not going to happen, but,
7 hypothetically, let's say I get out of this hearing, and I go
8 to work and I work fast and I get it done, the order goes out
9 today. And it says exactly what you want it to say. This was
10 a determination. They have to act promptly. You've got to
11 promulgate these standards as a rule. That gives the state 90
12 days, right?

13 MR. GUEST: Gives EPA --

14 THE COURT: The state can still come up with
15 their own standards.

16 MR. GUEST: Well, the EPA can -- yes, it does, but
17 the state can't do that. There is no way they could do that.

18 THE COURT: What, act that fast?

19 MR. GUEST: Well, no, because they've got to -- what
20 the state has to do is they've got to have a published and
21 proposed rule, and they haven't done that yet; and then we've
22 got to go through the Environmental Regulatory Commission
23 process, and that takes forever, and then you have rules
24 challenged --

25 THE COURT: They have emergency rules over there,

1 too.

2 MR. GUEST: No, no. They could not do this as an
3 emergency rule, could not. That's that (4) (A), (B) item, you
4 could not do that.

5 THE COURT: I'm not sure you've persuaded me of that,
6 but perhaps --

7 MR. GUEST: If I had the opportunity --

8 THE COURT: Perhaps a federal court order is not an
9 emergency. But, in any event, let's leave that part out of
10 it. The state has some time to act. This rule is -- what you
11 want me to do is say promulgate the rule tomorrow, so I enter
12 a ruling today.

13 MR. GUEST: Propose.

14 THE COURT: Propose the rule tomorrow that goes into
15 effect --

16 MR. GUEST: Well, no. They have notice and comment.

17 THE COURT: Right.

18 MR. GUEST: Yeah, they have notice and comment.

19 THE COURT: And it goes into effect when?

20 MR. GUEST: They reach a final rule in 90 days.

21 THE COURT: Okay. But, meanwhile, the administrator
22 is in the Eleventh Circuit, and they've got a stay in place.

23 MR. GUEST: Well, I don't know. Are you going to
24 grant a stay? I mean, I don't know what justification --

25 THE COURT: If I'm with you so far, and I think you

1 win, and they need to do it, and it's taking too long, I may
2 well not grant a stay. But, you know, those folks in Atlanta,
3 they sometimes grant stays, too.

4 So, before we put this rule into effect, my guess is,
5 there are going to be three judges in Atlanta that satisfy
6 themselves that this rule ought to go into effect. So, call
7 me crazy, but I'm guessing their chance of getting a stay is
8 probably pretty good. So, my question is:

9 How long do you want to go on litigating the 1998
10 question, when you've got a slam-dunk on the 2009
11 determination?

12 MR. GUEST: I understand your point. You know, the
13 truth, Judge, is that I really think I need to talk this over
14 with Ms. Reimer, because I don't actually have a clear answer
15 to your question at this point.

16 THE COURT: All right. Let's do this. Let me get
17 you, if you have anything else, to finish that up.

18 MR. GUEST: I just have a couple of things.

19 THE COURT: Actually, I do have one more question,
20 too. And then what we'll do is, before -- you'll get a chance
21 at rebuttal, anyway, and we'll take a break in there.

22 MR. GUEST: Okay.

23 THE COURT: So, you will be able to talk to her.

24 Here's my other question:

25 Why has there been no review of this in the Eleventh

1 Circuit based on any triangular review, or anything else,
2 since '98? I mean, if you -- you've been watching this since
3 '98, I assume.

4 MR. GUEST: Yeah.

5 THE COURT: You or some colleague, but I'm guessing
6 you.

7 MR. GUEST: Yeah.

8 THE COURT: You have been involved looking at this
9 since 1998, and the state has an obligation to look at this
10 every three years and to report to the EPA, and nothing has
11 been moving. Well, there's been some progress; but,
12 basically, it's been a long time. There have been a lot of
13 triangular reviews since 1998, and nobody has gone to the
14 Eleventh Circuit to say, "They made a bad decision."

15 MR. GUEST: Why haven't we done that, is that your
16 question?

17 THE COURT: Yes. If this was a determination in '98
18 so that this had to be done, why haven't you just gone to the
19 Eleventh Circuit, that route?

20 MR. GUEST: Well, the true honest answer is that we
21 actually believed the DEP when they told us that they were
22 going to do it.

23 THE COURT: Fair enough.

24 MR. GUEST: That was a mistake. And as the course of
25 time past, the prospects for getting something reasonable out

1 of that agency diminished, and the prospects had continued to
2 worsen.

3 THE COURT: But you think that that is a route of
4 review of this kind of a decision, and I think the DC Circuit
5 case may say it's not.

6 MR. GUEST: Well, I suppose that -- yeah, I suppose,
7 you could conceivably do it that way.

8 MS. REIMER: I don't know.

9 MR. GUEST: Wait a minute. I'm going to answer that
10 one at the same time when I do my other one.

11 THE COURT: Fair enough.

12 MR. GUEST: So I don't make any mistakes here.

13 THE COURT: Okay.

14 MR. GUEST: Let me speak to, I guess -- while there
15 really isn't any question, and I concur absolutely, that the
16 January 14th memo from the Assistant Administrator for Water
17 threads the needle as perfectly as one can thread it, the Luna
18 memo discloses that this was made for this litigation. And,
19 of course, you know, when you make your own evidence, you do a
20 pretty good job.

21 So, I don't think it's fair to give that any weight
22 as something against which to compare the 1998 determination,
23 because it was made for the case.

24 And if I was going to make it for the case,
25 representing the defendants, pretty well exactly what I would

1 do is do exactly the same thing. But we submit it should not
2 carry weight in respect to something to compare with, because
3 that's what it was designed for.

4 THE COURT: That's fair enough. It doesn't, in that
5 respect. But, look, what it looks like is not surprising.
6 We've all read letters that look like that, where agencies
7 act, and they say what they are doing and exactly what statute
8 they are doing it under, and why they're doing it. I mean,
9 that's what a typical determination would look like.

10 MR. GUEST: Well, that's not what happened in the
11 CORALations case. If you look at page --

12 THE COURT: Well, sure. Look, I guess my point is,
13 this doesn't prove anything one way or another. Agencies
14 sometimes write a picture-perfect explanation of what they are
15 doing, and agencies don't always do that. Sometimes they do,
16 and sometimes they don't. It seems to me the case doesn't
17 turn on the exact format of the '98 plan. The question is
18 what was it in substance.

19 MR. GUEST: Yeah, it's a substance in fact question,
20 we've always said that. So, that's one item.

21 Now, the other issue is that we have a pending motion
22 by the Water Management District to supplement the record,
23 which came in quite recently before I had time to respond.
24 So, I can respond, if I might, *ore tenus*.

25 And what this is --

1 THE COURT: Most of that stuff is stuff I would get
2 to, anyway. Frankly, I had already gone and found the
3 CORALations order. I think it wasn't in the record, but --

4 MR. GUEST: I'm not complaining about the CORALations
5 order. Not that. There was a January -- a mid January of
6 2009 DEP plan to do numeric nutrient criteria, and the first
7 opening lines of the January 14th Grumbles' memo says that,
8 "We've talked this over with the Secretary of the State DEP,
9 and he's in concurrence that this is a good idea and
10 everything," and so at the same time, up pops this new plan.
11 And so the Water Management District says, "Look at this, we
12 have this new plan."

13 It's just like the CORALations case, where nothing
14 happens for a long time or you don't get any actions for a
15 long time, and then the lawsuit is filed, and then all of a
16 sudden these things happen.

17 And it should be seen in context. And we submit that
18 the fact that it came at the same time as the Grumbles' memo,
19 and that the Grumbles' memo talks about some coordination with
20 the state, I think that it spreads the Luna memo, this is for
21 litigation taint, into the DEP plan, because we think that is
22 similarly tainted by this litigation.

23 What further reinforces that inference is that this
24 thing popped up on the website at the same time -- that is,
25 the DEP website -- pops up at the same time as the Grumbles'

1 determination does.

2 And then what happened was, two months later that one
3 disappeared and another one appeared, which has longer
4 deadlines in it, you know, longer target dates in it by about
5 a year.

6 So, this is really sort of a constantly moving
7 target. And in the context of litigation, we think it's
8 highly prejudicial to have that used against us. So, that's
9 the reason we oppose the use of that plan.

10 THE COURT: Well, isn't it at least relevant on the
11 question of reasonable time and equitable relief?

12 MR. GUEST: Well, the thing --

13 THE COURT: I understand the argument that they just
14 did it because they were trying to influence the litigation.
15 It seems to me that, as judges like to say, goes to weight not
16 admissibility.

17 MR. GUEST: Well, of course, there are cases that
18 say -- that we've cited -- that say that things that were made
19 for litigation carry no weight. I know what your point is.
20 If it's got a gram in there, you can consider the gram. But
21 what we think is that, when they're talking about what they
22 want to do in time, and then they do it, they pop it out when
23 the Grumbles' memo comes out, and then they change their minds
24 two months later, what we think that that reveals is that this
25 process that has gone on for many years, over ten, of finding

1 the decisional process tossed in the seas of the influence of
2 the folks that are adversely affected by water quality
3 criteria, continues, even in the course of establishing, you
4 know, deadlines and time frames. And that reinforces, if it
5 does anything, the probative value is that it reinforces the
6 necessity of a specific relief from this court.

7 THE COURT: Okay. Thank you.

8 Ms. Mann?

9 MS. MANN: Thank you, Your Honor.

10 In this case, the plaintiffs are stating that, under
11 Clean Water Act, Section 303(c)(4)(B), EPA's administrator
12 took a purely discretionary, *sua sponte* action in the Clean
13 Water Action Plan. But there is no evidence in the Clean
14 Water Action Plan that the EPA administrator was taking a
15 303(c)(4)(B) determination and had undergone a review of the
16 states' water quality standards for nutrients, or found those
17 standards to be insufficient.

18 The Clean Water Action Plan, I think, as Your Honor
19 understands it, does not cite to any statutory provision,
20 including 303(c)(4)(B), and the sections discussing nutrients.
21 It also does not state that the administrator is exercising
22 any discretion. It also does not even mention review of
23 anybody, any states' water quality standards. The Clean Water
24 Action Plan also does not state that any state standards are
25 insufficient.

1 There is no recognition, as you asked earlier, that
2 anybody at EPA understood that they were taking an action
3 under 303(c) (4) (B). It belies --

4 THE COURT: But suppose the administrator just issued
5 a document and it said, "I hereby determine that any narrative
6 nutrient standard that is has no numeric component is
7 inadequate, and that's why water quality is what it is,
8 period."

9 Now, doesn't the Clean Water Act say that, if that's
10 what the administrator did, then the administrator must
11 promptly do something about it, take the action required?

12 So, all of the things you just told me would be true
13 of that document; and, yet, that would trigger the duty,
14 wouldn't it?

15 MS. MANN: It could, Your Honor, especially because,
16 in the example that you just pointed out, you have an
17 administrator who is using words like "determination" and
18 "insufficient"; and there is no such thing in the Clean Water
19 Action Plan.

20 The Clean Water Action Plan, what it is and what it
21 was intended to be, was a policy document. As the court, you
22 know, posited to opposing counsel, isn't this a plan of where
23 we are going? It was exactly intended to be a plan of where
24 the federal agencies that were involved in clean water issues
25 were going with respect to the future to improve the nation's

1 waters.

2 THE COURT: And if that's right, then it's not a
3 determination, it seems to me. So, that would work. But it
4 doesn't work because it's not the administrator. She signed
5 it. She signed the cover letter.

6 MS. MANN: That's correct.

7 THE COURT: Clearly, she -- I assume she read it, but
8 whether she did or not, she signed off on it.

9 MS. MANN: And I want to clarify that EPA is not
10 suggesting that it didn't intend to undertake any of the
11 actions that it stated it would. I'm not saying that the
12 administrator disavows any part of the Clean Water Action
13 Plan.

14 THE COURT: That was the plan. The administrator did
15 it. You don't say that a determination has to be in some
16 specific form, citing the statute, has to have the right
17 ribbon or seal, or whatever, but it has to be a determination.
18 As long as it's a determination, whatever form it's in, that's
19 good enough.

20 MS. MANN: I think the parties, Your Honor, have all
21 agreed that it has to be the administrator or somebody with
22 the capacity to speak for the administrator.

23 THE COURT: Right.

24 MS. MANN: It has to include some statement that
25 there has been a review of the states' water quality

1 standards, and it has to include some type of statement that
2 the states' water quality standards were not sufficient.

3 I cited in my brief, Your Honor, where plaintiffs and
4 EPA and, to a similar degree, at least one of the intervenors,
5 have all agreed on that point.

6 And, yet, those basics are not part of the Clean
7 Water Action Plan. There is no statement in the Clean Water
8 Action Plan that anybody at EPA had reviewed any particular
9 state's or all states' water quality standards for nutrients.

10 There is similarly no statement or words like
11 "determination" or "finding" that any state's water quality
12 standards were not sufficient, and that new or revised water
13 quality standards would be necessary to meet the requirements
14 of the Clean Water Act.

15 That is why, Your Honor, plaintiffs are trying to
16 sort of bolster or prop-up the Clean Water Action Plan by
17 citing to a number of other documents that were compiled as
18 part of the record that EPA compiled for the nutrient
19 strategy, which was the original document that they alleged
20 was the determination in this case.

21 All of these other documents that the plaintiffs are
22 pointing to, many of them, were not even created or
23 distributed or published by EPA in any way. Many of them are
24 clearly not relevant at all, don't even speak to who is
25 writing them or -- you know, you have things like invitations

1 or statements from workshops, who's attending. Those things
2 do not signify review of any state's water quality standards.

3 The only documents that they cite to that were part
4 of the record for the 1998 strategy that even talk about water
5 quality standards for nutrients really speak to, "We have this
6 growing concern; here's what some people are doing; here is
7 where we think we are doing." That's what you have in some of
8 the documents that they've cited to.

9 But there -- just like the Clean Water Action Plan,
10 there is no finding that there has been a review. There is a
11 summary of what states have, what kind of standards, but there
12 is no analysis, a review of those standards. And there's,
13 similarly, no finding that what any particular state is doing
14 is inadequate to the degree that it would require new or
15 revised water quality standards.

16 THE COURT: Well, there is certainly an indication
17 that, if they don't have numbers by 2003 --

18 MS. MANN: EPA would take appropriate action.
19 Mr. Guest pointed out to you the language on page 59 of the
20 Clean Water Action Plan, which states, *"If the state does not*
21 *adopt --"* and I'm quoting here *"-- appropriate nutrient*
22 *standards, EPA will begin the process of promulgating nutrient*
23 *standards."*

24 That doesn't say that -- that leaves discretion to
25 the agency to decide. That discretion is echoed, Your Honor,

1 if you want to talk about what recognition there was within
2 the agency, in many of the documents that come after the Clean
3 Water Action Plan, including the 1998 strategy, and other
4 documents that come later, it makes clear that EPA will, if it
5 finds it necessary, make a determination.

6 THE COURT: So what happened? I mean, in '98, they
7 say half, higher and lower in some, but half of the waters
8 have nutrient problems; and, frankly, any of us that live in
9 Florida, I suspect anywhere else, knew that before anybody
10 told us.

11 So, you have major nutrient problems. The EPA says,
12 "We're going to need -- our plan is to have numeric standards.
13 We are going to get them promulgated within a couple of
14 years," and they did, maybe a little long. The one I read was
15 December '01, I think, but somewhere in that time frame they
16 got the guidelines out.

17 Then they said the states are going to have three
18 years to get it done. And so we get around to about 2003 or
19 so, they are supposed to do a review every three years in the
20 state, and now all of a sudden here we are, eight years later,
21 nothing has happened, until we come right up to a summary
22 judgment hearing, and then there is this delegation, which the
23 request for delegation says, "We would like to make a
24 determination, to evaluate whether to make a determination,"
25 and, lo and behold, in two weeks they are able to do all the

1 evaluation and make the determination. Two weeks may put it a
2 little bit low. But it's over the holidays, so it's not very
3 much. In less than a month, they've done all of the analysis,
4 and they made a determination.

5 What happened for that eight years in there where
6 just nothing went on?

7 MS. MANN: Well, Your Honor, if I can -- I will
8 respond by saying that, just because the plaintiffs believe
9 that there was information before the administrator in 1998 to
10 make a determination, does not mean that the administrator
11 took that discretionary step. It's a discretionary act. Just
12 because you think there's sufficient information for an
13 administrator to make that determination does not mean that
14 the administrator has done so. And I will acknowledge --

15 THE COURT: Oh, absolutely. So, even if it's not a
16 determination, I guess my question went to the point, well, at
17 least they laid out a plan; and for a couple of years
18 everybody followed it, and then all of a sudden there is this
19 long period where, so far as I can tell, the South Florida
20 Water Management District -- maybe they'll speak in a
21 minute -- they say this is really complicated, and they were
22 really working night and day, and I should take the 11-year
23 break as an indication just how hard they worked.

24 One scratches one's head and says, "Well, you know, I
25 guess, if they spent 30 years, that would show they had been

1 working even harder."

2 But I do kind of wonder, what in the world has gone
3 on, or did we just change policy?

4 MS. MANN: Well, Your Honor, I can say that I believe
5 the nutrient criteria are more a difficult thing than perhaps
6 was originally thought in 1998. And I can also state that EPA
7 has been working with all states, including Florida, to try to
8 bring numeric criteria into reality.

9 And even if you look at, you know, if you take
10 Mr. Guest up on his recommendation and disregard anything that
11 was put out by the state before this lawsuit was filed, you
12 could see that DEP was on the brink of creating numeric
13 standards.

14 Now, they didn't do it the way that the plaintiffs
15 would like, and I think personally that's the biggest gripe
16 going, is how to do this, but EPA was working with the state
17 and other states to try to get numeric standards.

18 The state has spent over \$20 million trying to obtain
19 information, so that they have site-specific data that they
20 can use to create probably the most defensible standards.

21 But the major point I want to make to Your Honor
22 is --

23 THE COURT: If what you decided along in those --
24 along in there somewhere was what we really want to do is just
25 nothing; we really don't want to worry about the water, and we

1 don't want to make anybody quit putting nutrients in the
2 water, so let's just kick the can down the road, what would
3 you do different?

4 MS. MANN: If I were the plaintiffs, I would have
5 filed suit saying that the triangular review isn't sufficient.

6 THE COURT: I meant, if you were the EPA and the DEP
7 and the South Florida Water Management District, you would
8 just study the heck out of this, wouldn't you? And then 11
9 years later you could say, "Judge, we spent \$20 million, and
10 we've been studying so hard, it's just complicated."

11 MS. MANN: Well, I do recognize the court's
12 frustration and the plaintiffs' frustration that this has not
13 happened sooner.

14 But the legal question here, Your Honor, is whether
15 EPA exercised discretion under the Clean Water Act; and there
16 is no evidence that the plaintiffs have provided to the court
17 that would suggest that. And as you mentioned earlier, it is
18 substantially academic as to what's going to happen next.

19 EPA has made a determination. It is, I think, a
20 natural thing anytime a lawsuit is filed for an agency to look
21 at its litigation risk and decide whether or not it should try
22 to make a determination. Maybe it's a way to try to bridge a
23 gap and reach a settlement with another party. Maybe it's a
24 way to resolve the situation in another way.

25 THE COURT: Or you take a fresh look and say, maybe,

1 they're right, maybe this is the determination. I don't fault
2 anybody for making the determination.

3 What about just stopping, letting them amend, add a
4 case based on the January 14th determination; and, if it gets
5 promptly implemented, fine; and, if it doesn't, give equitable
6 relief then?

7 MS. MANN: Well, Your Honor, I think in that case
8 they would have to bring an unreasonable delay claim, if they
9 don't believe that something is happening promptly enough, and
10 it's -- I don't know if --

11 THE COURT: Isn't that what this is, in effect?

12 MS. MANN: No, Your Honor.

13 THE COURT: I mean, that's what this case is. This
14 case says they made a determination; they haven't implemented
15 it. So, why doesn't the next count just say, now they've made
16 a determination in '09, and they've delayed implementing it,
17 so enter an injunction and tell them to do it promptly, like
18 the law says.

19 MS. MANN: Two things to try to answer your question,
20 and tell me if I don't completely answer it.

21 One is that this is an unusual case. I know earlier
22 when we were before you, there was a discussion of how this
23 fits with the EPA and citizen-suit provision. I don't
24 believe, personally, that it has to be -- a determination has
25 to be a final agency action, which is what you would need to

1 bring an EPA suit. And I believe that that may be why the
2 plaintiffs pursued this under the citizen-suit provision,
3 rather than saying that there was an action taken, and a final
4 agency action. Also, I guess, they may have been prohibited
5 from bringing the suit under the statute of limitations,
6 but --

7 THE COURT: But leave that aside, I mean, I guess,
8 why can't it be a citizen suit? Why can't they bring a
9 citizen suit that says a determination was made on
10 January 14th, '09; therefore, the administrator has to promptly
11 prepare and publish proposed regulations setting forth revised
12 or new water quality standards; haven't done it, enter an
13 injunction, tell them to do it.

14 MS. MANN: And I would not oppose such an amendment,
15 if the plaintiffs sought leave from the court to do so. I
16 believe we would defend it the same way that we are defending
17 it in our papers now, which is that EPA, frankly, doesn't
18 believe that using the guidance criteria that was published in
19 2000 is the preferred or most appropriate way to establish
20 numeric criteria for nutrients in Florida, especially given --
21 and you may look at this with some skepticism, but especially
22 in light of the large data set that we have here.

23 THE COURT: Okay. But if two years is too long, then
24 you wouldn't have to enter an order that said promulgate the
25 guidelines as the standards, but you could say do it within

1 six months, don't do it within two years.

2 MS. MANN: If the plaintiffs wanted to --

3 THE COURT: And then at the end of six months, you
4 could either promulgate the guidelines that you have, or
5 something else. You can take that data set. But I guess the
6 injunction would say that, but this is not a two-year -- two
7 years is not prompt. And maybe it is. I mean, I don't --

8 I should say this to all of you. Nobody should take
9 my questions as indicating a ruling on anything. I'm looking
10 for help; and so, as I have questions, I ask them.

11 MS. MANN: What I would suggest then, Your Honor, is
12 that, if the plaintiffs wanted to amend; and, if they wanted
13 to state that this 2009 determination created a mandatory
14 duty, and that EPA needs to act within however many days, we
15 would probably then all bring to you additional information to
16 support our various arguments as to why one year for certain
17 waters and two years for other waters is appropriate in EPA's
18 view, and why they believe that the 2000 guidance criteria
19 should be used in their view. And the state may have
20 somewhere else that they land.

21 But I think that that would require additional
22 information to be brought before the court. We could
23 certainly all do that, I'm sure.

24 THE COURT: It might well. I assume there may be
25 some administrative record. I don't know if EPA -- I assume

1 EPA looks at this one-year/two-year proposal, right? I mean,
2 if the state comes in and says, "You've made a determination.
3 We're going to do it, and it's going to take us 35 years," I
4 assume EPA says, "No, that won't do."

5 MS. MANN: Right. Well, at this point then the
6 laboring oar is on EPA; and, unless the state proposes water
7 quality standards before EPA, then EPA is committed to doing
8 it within the time frame that's been stated in the
9 January 2009 determination.

10 I'm not sure if I answered your question.

11 THE COURT: Maybe you did. Where does the one year
12 and two years come from? Is that in the determination?

13 MS. MANN: In the determination, Your Honor.

14 THE COURT: So that's an EPA time frame.

15 MS. MANN: EPA has set out a time frame, coastal and
16 estuarine waters are the two years; and the flowing waters and
17 rivers are the one year.

18 At this point, you know, we are obligated, we are
19 committed, but the state could come out ahead of us. That is
20 certainly a possibility.

21 But I think to answer your question, if they wanted
22 to amend -- if you, first of all, found that there had been no
23 findings in 1998, then you certainly are looking at a
24 January 2009 determination rather than a 1998 determination.

25 If the court only looks to the January 2009

1 determination, should they amend, then we would certainly
2 probably would want to provide briefing on the reasonableness
3 of any particular party's time frames or deadlines.

4 THE COURT: All right. And the time frame is or is
5 not likely to be different. I mean, I guess where this
6 started was your assertion that this is largely academic, not
7 quite moot, but that certainly affects the practicality of
8 this. This is a nice question, whether the '98 plan is a
9 determination. My decision, of course, is not binding on
10 anybody. It's just one district judge's decision in one case.
11 But, obviously, the same issue could arise in all 50 states.
12 So, a decision on the question might have some practical
13 significance.

14 On the other hand, if it has no practical
15 significance in this case, my usual approach is to decide what
16 needs to be decided and not decide what doesn't need to be
17 decided. So, if it makes a difference, then I'll decide it.
18 If it doesn't make a difference, I usually try not to.

19 And so I guess my question is:

20 In terms of the time frame, does this make a real
21 difference? If there is a '98 determination, then am I going
22 to enter an order telling you to go faster?

23 MS. MANN: No, Your Honor. If you look at Section 3
24 of our response brief, I think we stated that, even if the
25 court were to determine that the 1998 Clean Water Action Plan

1 were a determination, that the time frame that is set out in
2 the January 2009 determination is a reasonable one.

3 THE COURT: All right. You did say that. You are
4 prepared, then, to defend the one-year, two-year timeline.

5 MS. MANN: That's correct, Your Honor, for the
6 reasons that we've stated in the brief, regarding EPA's
7 recommendations as to how to utilize the guidance criteria
8 that were published in 2000.

9 THE COURT: All right. And how would you propose
10 that I decide that question of reasonableness, on the record I
11 have before me; or would I -- if I ruled that that was a
12 determination, would I then essentially grant summary judgment
13 on liability and set a trial on remedy, or something along
14 those lines?

15 MS. MANN: Well, I think you raise a good point,
16 because there is not a lot in the documents that have been
17 provided to the court that speak to remedy, if the court were
18 going to get into ordering EPA to do something under any
19 particular time.

20 I would suggest, though, that it may be premature for
21 anybody to -- I don't know. I have to think about it, but I
22 did not expect you to suggest that plaintiffs modify their
23 suit to bring a claim that the 2009 determination was the
24 operative one, and that a two-year projected time frame is
25 inadequate. I think there may be questions of ripeness

1 involved there, so I reserve my right to argue ripeness
2 questions to you.

3 THE COURT: You shouldn't understand my question as
4 being a suggestion that they amend, or that the two years is
5 not enough. It's really a question trying to explore the
6 practical implications of this.

7 MS. MANN: I understand, Your Honor.

8 THE COURT: Okay.

9 MS. MANN: So, to answer your question, I do not
10 think that there is a lot of information in the materials that
11 you have before you that would make the decision easy. You
12 may want more information from the parties in order to make a
13 decision as to how reasonable EPA's projected time frame is.

14 THE COURT: One of the things you said in your reply
15 brief was that the Florida Department would finish collecting,
16 analyzing and complying available data by the end of
17 March 2009. Are they through?

18 MS. MANN: I would have to ask the state, Your Honor.
19 I know that was what was the understanding when the
20 determination was made in January. And I would ask that the
21 state confirm that that did, in fact, come to completion at
22 the end of March.

23 THE COURT: All right.

24 MS. MANN: I don't have anything more, unless the
25 court has any additional questions.

1 THE COURT: I have one that I think I know the answer
2 to. You -- and the question was, does the administrator --
3 administrator ever make a determination under this (4) (B) for
4 the entire nation, or is it always just state-specific?

5 MS. MANN: It is my understanding that it was done in
6 the toxics rule, Your Honor, but I don't have much in the way
7 of direct knowledge of that rule.

8 THE COURT: Okay. So, there could be a time when
9 they just say, "Look, this applies everywhere."

10 MS. MANN: I would acknowledge that that could be
11 done.

12 Excuse me one second. I think that's all I have,
13 Your Honor.

14 Oh, I do want to clarify one thing about CORALations,
15 in case the court does decide the issue of whether there was a
16 1998 determination.

17 I think the most that can be said about the
18 CORALations decision is that a 303(c) (4) (B) determination, as
19 you suggest, may not always have to have a checklist of items;
20 but, even if you look at the CORALations documents that the
21 court looked at there, there were words like, "We reviewed
22 your water quality standards; we have found them to be
23 deficient in the following ways." Even if you look at the
24 CORALations decision, you don't see that in the Clean Water
25 Action Plan, and you don't see that in the string-cite of

1 record documents that the plaintiffs have provided to the
2 court.

3 So, if you don't have any more questions, I'll take a
4 seat.

5 THE COURT: No, that's all. Thank you.

6 Next? I say that assuming everybody didn't want to
7 defer to Ms. Mann, but --

8 MR. PETTIT: Good morning, Your Honor. Christopher
9 Pettit for the South Florida Water Management District.

10 Your Honor, the district is before this court to
11 ensure that sound science is utilized through the proper Clean
12 Water Act processes, and that the proper federal and state
13 roles are preserved through those processes.

14 It's clear from the testimony you have heard today
15 and the documents that the Clean Water Action Plan and the
16 strategy did not have any intentions to operate as a formal
17 determination under the Clean Water Act.

18 What they did do was develop a framework of
19 cooperative federalism. As evidence, the EPA never operated
20 or proceeded as though a determination was made. None of the
21 state governments did. None of the regulated entities.
22 Apparently, only the plaintiffs realized that there was
23 actually a determination within the documents. The rest of us
24 proceeded through this cooperative federalism framework, and
25 in this period of years, after the 2001 promulgation of the

1 technical guidance, nothing, quote, unquote, happened.

2 We do have a submission in 2003 of a development plan
3 for the development of numeric nutrient criteria by the state
4 of Florida, transmitted up to the EPA. EPA sends a letter
5 back to the state, basically, setting forth that, "Yes, we are
6 following a reasonable process toward promulgating your
7 nutrient criteria; and that, eventually, if you are unable to
8 conform with the plan or are unable to meet the guidelines
9 that you're setting for yourselves, a determination may be
10 necessary at that point for the EPA to remove this to the
11 federal process."

12 THE COURT: And if what they were trying to do was
13 just to quit worrying about water in Florida, their response
14 would look about the same, wouldn't it? That's about what --
15 if what you wanted to do was just not worry about it anymore,
16 you would write a response something like that, "Oh, you're
17 making reasonable progress, get back to us in a few years."

18 MR. PETTIT: Well, at the same time, Your Honor, the
19 district does, again, in 2007, submit a much broader document;
20 again, the same process happens.

21 As Your Honor noted, you do have a triangular review
22 process going on, where the narrative standard that is still
23 valid in this state is being submitted and is being approved
24 by the EPA.

25 Again, Your Honor, in the Clean Water Action Plan and

1 in the national strategy, there is a distinct recognition of
2 the federalism process; and, if the EPA had intended to remove
3 from the state process the ability of states to promulgate
4 these standards to the federal level, the Clean Water Act
5 itself says, "The EPA shall promulgate once a determination is
6 made."

7 In this case, there is a clear indication that there
8 is a desire to set nutrient criteria. The state -- the
9 district and the state are not arguing that. There is just a
10 recognition that the science isn't there; that there needs to
11 be a cooperative effort, and that the states need to strive
12 towards that.

13 It was one of those situations in which the state was
14 still being given the responsibility, but the EPA is saying,
15 "We need to get this done; if you don't get this done, it's
16 going to be brought to the federal level."

17 Additionally, Your Honor, we're looking at a
18 situation in which, if this court does find that there is a
19 determination, every state government and every interested
20 regulated party would be foreclosed from being able to
21 challenge that determination in which there was a recognition
22 that there was a lack of science, due to the statute of
23 limitations.

24 The district would put forth that that is not a
25 result that we would like to reach at all.

1 THE COURT: I don't understand that at all. If I
2 make a decision that there is a determination, and the state
3 of North Carolina doesn't agree, then they don't do anything.
4 If there is a lawsuit in North Carolina, a district judge in
5 North Carolina will decide whether or not there was a
6 determination, and that will go to the Fourth Circuit, and my
7 decision isn't going to bind anybody.

8 MR. PETTIT: It is persuasive authority, though, Your
9 Honor.

10 THE COURT: Sometimes.

11 MR. PETTIT: Depends on where it is.

12 THE COURT: Depends on how well I do, I guess. Okay.
13 But it's not in any sense binding.

14 MR. PETTIT: I would just like to note, Your Honor --

15 THE COURT: I do understand it would have been
16 difficult to challenge the plan. Somebody tried to do that,
17 at least somebody on the other side of the issue, tried to
18 challenge the plan and didn't get anywhere out of Colorado. I
19 understand.

20 MR. PETTIT: I would like to note, again, the
21 District Court in Colorado, come to speak of it, did recognize
22 that the plan did not constitute final agency action; that
23 legal consequences could flow from it. It recognized that it
24 was a guidance document; it was a planning document.

25 While you may be able to point to "wills" as part of

1 the plan and the strategy, it's clear that, on the first page,
2 in that letter, it's a cooperative approach. It's the state
3 tribal, federal, and local governments working together. The
4 national strategy that implements it, while the Clean Water
5 Action Plan may state that states will come up with this, the
6 implementing document states that the specific state
7 governments should have come up with these plans by 2003. If
8 they had not, at that time the EPA would take a look at things
9 and decide whether it was needed to make a formal
10 determination.

11 THE COURT: All that qualifying language is not in
12 there. It doesn't say will take a look at things and decide
13 whether anything is needed. It says, "We will act." But I
14 understand.

15 In your brief, I take it, you indicated, it seemed to
16 me, quite proudly, that you had spent 11 years working on
17 this. The district stands by that; you're happy with the 11
18 years it's taken; you're in no rush to get anything done.

19 MR. PETTIT: No, we would not say that, Your Honor.
20 What we were pointing out is that it took 11 years to
21 promulgate a single criteria for a single sub-ecoregion in the
22 state of Florida, that being the Everglades.

23 In this case you're dealing with the entire state.
24 You're dealing with streams, lakes and rivers. You're dealing
25 with coastal regions and estuaries. You're dealing with

1 wetlands. While the EPA has their ecoregions, DEP has come
2 out and said that there are 41 separate subregions that need
3 to be considered due to the localized conditions.

4 Another thing that both the plan and the strategy and
5 subsequent activities on both the parties has demonstrated is
6 that, in Florida, you are dealing with a very unique
7 situation, a very complex situation, a number of areas where
8 localized and very unique conditions are in place. And at
9 that point there needs to be a significant amount of time
10 taken to make sure that the science is right.

11 THE COURT: I kind of have the impression that what
12 the district is telling me is that, what we really need to do
13 is spend 20 years studying this in detail, so that we get a
14 standard that is really a good standard; and, if all of the
15 lakes and rivers by then are gone, well, at least we've got
16 the standard right.

17 MR. PETTIT: There is a balancing that would need to
18 take place, Your Honor.

19 THE COURT: The water is degrading, yes? You know,
20 I'm in North Florida, not South Florida. I know the
21 Everglades are there, but I don't see them. But here in North
22 Florida, Wakulla County Springs has been in the news quite a
23 bit.

24 MR. PETTIT: Yes, Your Honor.

25 THE COURT: Now, it's an outstanding state water;

1 and, apparently, this problem we're talking about has had a
2 very substantial effect on Wakulla Springs.

3 MR. PETTIT: The district is not putting forth that
4 there is not a serious water quality standards. However, the
5 standards that are put -- I'm sorry -- water quality issues.
6 The standards that are put forth, however, have to be
7 scientifically defensive. They have to be based on science.
8 They have to, on the state level, be able to stand up to an
9 administrative challenge. On the federal level, they have to
10 be supported in that they are not arbitrary and capricious and
11 are actually able to be supported by that science.

12 What the district is saying is that there is a great
13 deal of work that's being done and needs to be done. DEP in
14 the next few years has set out \$20 million and has engaged
15 numerous studies to look at the effects.

16 When you look at the technical guidance documents,
17 there are gaps; there are places with estuaries and wetlands
18 where there is no suggested 304(a) guidance.

19 What the district is putting forth is that there
20 needs to be the work done and to make sure that the proper
21 science is there to support whatever standards are
22 promulgated.

23 THE COURT: So, is the district okay with the EPA's
24 one-year, two-year approach; or is it going to be your
25 position that what we need is more time?

1 MR. PETTIT: There is a difference in opinion, Your
2 Honor. The 2009 document that DEP has set out has put forward
3 different time frames that are somewhat longer than EPA's.

4 Again, the DEP and the district, both, have the
5 localized knowledge to be able to tell the EPA through the
6 processes that we have, through the RTAG, through the TAC,
7 that this is going to be an issue, or this is going to be an
8 issue, and I identify different problems through this
9 cooperative federal framework.

10 THE COURT: So you don't have any hesitation standing
11 there and telling me two years is too soon.

12 MR. PETTIT: That may be the case.

13 THE COURT: We have a document in 1998 saying this
14 needed to happen, and you're saying that 2011 is too soon.

15 MR. PETTIT: It may be the case, Your Honor. We know
16 that DEP is working as hard as they can.

17 THE COURT: Of course. Look, if you spent 13 years
18 studying this, I'm going to take a wild guess that the data
19 that you determined in the first five years of the study is
20 probably not very good data anymore.

21 MR. PETTIT: That's true -- that could be the case,
22 Your Honor, yes, sir.

23 THE COURT: You could probably push this out till
24 we're all dead.

25 MR. PETTIT: I believe you're dealing with good-faith

1 actors, though, Your Honor. I believe we are in a situation
2 where there is ample evidence through the administrative
3 records, through the reports that have been put out, through
4 the various scientific studies that have been done, we want to
5 make sure that the numbers are right; and we are anticipating
6 that, when these criteria are promulgated, we are going to be
7 facing challenges to those criteria by a variety of different
8 interests. The ability to defend those challenges is very
9 important.

10 THE COURT: So, if you can put off promulgating for
11 another five or six years, and then you can make the
12 challenges last another five or six years, you really are
13 12 more years down the road.

14 MR. PETTIT: In this case we have a 2009 formal
15 determination that is not before this court at this time, and
16 we will, eventually, I'm sure, have the opportunity to
17 possibly get to the point of whether promptly, under the Clean
18 Water Act, is, I guess, the one- and two-year time frames do
19 work for that.

20 THE COURT: Two decades or less. I mean, I'm really
21 hearing you saying two decades is good enough.

22 MR. PETTIT: I guess what I'm saying, you need to
23 take the time to do it right. If that's two decades, so be it.
24 That being said, at this point we do know that DEP is almost
25 there and is to the point that -- I believe it was October --

1 that they were getting to the point where they are going to be
2 able to deal with this, at least the lakes and streams. The
3 estuaries is an entirely -- they are complicated ecoregions,
4 Your Honor, and they are complicated ecosystems, Your Honor,
5 to deal with. It's not something like throwing darts to a
6 wall, I suppose.

7 THE COURT: They're complicated to get back, too.
8 Once you lose them, they're complicated to get back.

9 MR. PETTIT: Absolutely, Your Honor. I don't deny
10 that.

11 THE COURT: All right.

12 MR. PETTIT: If I may, Your Honor, one more note.

13 The district is appreciative that we are before this
14 court as an intervenor; however, we would like to point out
15 that the briefs -- and we're not looking to re-debate the
16 issue -- however, we do think that the briefs in the case and
17 the record demonstrate that the district does have a unique
18 interest that is separate from the federal defendants. We do
19 believe that the arguments that are being raised,
20 particularly, in terms of these time frames, distinguish us
21 from the EPA. And anticipating that we will be back before
22 this court at some other point, we would like to just ask you
23 to note that we needed to be here as of right as opposed to
24 permissive intervention.

25 Thank you very much, sir.

1 THE COURT: All right. Thank you.

2 MR. BROWN: May it please the court?

3 THE COURT: Mr. Brown?

4 MR. BROWN: Your Honor, I'm Jeffrey Brown from the
5 law firm of Oertel, Fernandes, Cole & Bryant, for the Florida
6 Pulp and Paper Association and the other intervenors that we
7 referred to in our memorandum as the Association Intervenors.

8 The court having granted permissive intervention to
9 our clients, we have made an effort not to duplicate the
10 arguments that have been submitted by EPA and by the South
11 Florida Water Management District.

12 THE COURT: And I appreciate that.

13 MR. BROWN: For that purpose, Your Honor, I would
14 like to simply submit one or two additional reasons for the
15 court to deny the relief sought by the plaintiffs in this case
16 on a slightly different reasoning suggested by the other
17 parties.

18 Your Honor, the statute at issue in this case
19 requires, not only a determination that a new or revised water
20 quality standard is desirable or even necessary for an
21 abstract policy goal, it requires a determination that a new
22 or revised standard is necessary to meet the requirements of
23 the Clean Water Act.

24 Focusing on that statutory language, I would like the
25 court to consider what knowledge was available to EPA and the

1 state as of 1998, which is the time that the plaintiffs
2 contend that that determination was made under the statute.

3 By way of background, as indicated in our memorandum,
4 EPA regulations describe the type of information that states
5 should follow when they are adopting water quality criteria.
6 These fall down into three general categories.

7 First, EPA guidance criteria.

8 Second, EPA guidance criteria modified to reflect
9 site-specific conditions.

10 Third, a catchall category, which is other
11 scientifically-defensible methods.

12 Again, as I repeated, the plaintiffs' theory is based
13 upon a statement made by EPA in 1998. Assuming the facts that
14 are described in the plaintiffs' statement of facts in support
15 of their motion, EPA did not have guidance criteria available
16 to it in 1998, and the record does not reveal that either the
17 EPA or the state had sufficient data under EPA regulations to
18 develop or promulgate a numeric standard.

19 This leaves us with a simple rhetorical question. If
20 it would have been impossible, as we believe as shown by the
21 record, to develop a numeric standard in compliance with EPA
22 regulations, how could such a hypothetical standard be
23 necessary to meet the requirements of the Clean Water Act?

24 Very simply, Your Honor, we believe --

25 THE COURT: Why isn't the answer that, look, somebody

1 could look at this in 1998 and say nutrients are a major
2 problem; the narrative standards aren't working; this needs to
3 change. If we're going to accomplish the purposes of the Act,
4 we're going to have to have numeric standards. So, I hereby
5 determine that there must be numeric standards, get working on
6 it. You could do that, couldn't you?

7 MR. BROWN: I think the statute speaks in the present
8 tense; that the standard is necessary. And I believe that by
9 implication, that would presuppose that somebody could develop
10 a standard at that time that would be in compliance with the
11 Clean Water Act.

12 I don't think it would be logical for an agency to
13 say that a standard would be necessary, when the agency has
14 not even developed guidance criteria and had not even come
15 within two years of developing guidance criteria for anybody
16 to act.

17 THE COURT: So, a President can't say it's necessary
18 to put a man on the moon until we have the technology to put
19 him there?

20 MR. BROWN: I think the court has given a useful
21 analogy; and, that is, the President or the Vice President can
22 say this is a broad policy goal that EPA should follow; that
23 EPA will follow the Clean Water Act and pressure states and
24 urging Florida to work towards the development of standards.
25 And, in that context, I think that's what EPA was saying in

1 1998; that this is a policy goal that the states should
2 follow. But, based upon the language of that document and the
3 context of this specific statute, EPA did not make a
4 determination; and, if they didn't --

5 THE COURT: Fair enough. I understand that argument.
6 I guess, it just seems to me that saying it is necessary to
7 have numeric standards is not inconsistent with them not
8 existing at the moment. But I understand the suggestion. And
9 I interrupted you, you were going on to the other point.

10 MR. BROWN: The court having understood my rhetorical
11 question, the only other point I would --

12 THE COURT: If you ask another one, I will try not to
13 answer it. Go ahead.

14 MR. BROWN: The only other point that we raised in
15 our memorandum in opposition was, if the court was inclined to
16 consider the merits of this action and to rule in favor of the
17 plaintiffs on the question of liability, would be to consider
18 the doctrine of prudential mootness, based upon the cases
19 cited in our memorandum.

20 This would authorize the court to defer equitable or
21 declaratory relief in instances where the federal agency has
22 demonstrated a change in direction. And based upon the
23 questions that the court has submitted, we believe that
24 that -- to the plaintiffs in this case, we believe that that
25 doctrine would authorize the court, in its discretion, to

1 withhold declaratory and injunctive relief.

2 If the court has no further questions.

3 THE COURT: Okay.

4 MR. BROWN: I appreciate the court giving us the
5 opportunity to appear by permissive intervention.

6 THE COURT: I appreciate your help. Thank you.

7 Mr. Guest, I promised you a break, if you wanted one.

8 MR. GUEST: We would like to. We have found
9 ourselves needing to talk some of the issues that you raised
10 over to explain what we think happens under different
11 scenarios. I think we would benefit for some time to do it.

12 THE COURT: Tell me what you need. A 15-minute
13 break?

14 MR. GUEST: Yes, 15 minutes.

15 THE COURT: Okay, good. We will start back in 15
16 minutes. That will be five minutes till by that clock.

17 *(A recess was taken at 12:41 p.m.)*

18 *(The proceedings resumed at 1:00 p.m.)*

19 THE COURT: Please be seated.

20 Mr. Guest?

21 MR. GUEST: Thank you, Your Honor.

22 To answer some of the questions, if I might. First,
23 could this have been done by a state-by-state process; and one
24 of the questions was, could you do it through Section 509
25 Judicial Review, and Section 509 has a list of items in

1 there -- this is 509(b)(1)(E), and it reads -- this is, you
2 know, review of it, *"In approving or promulgating an effluent*
3 *limitation or other limitation under 301, 302, 306, or -4 or*
4 *-5,"* it doesn't have 303 there. So, we're not sure whether
5 you could get there through that route. That was one of the
6 answers to your question. We're not sure you can get there
7 that way because of the omission there.

8 So, that's first.

9 Second is that I think, as the United States
10 acknowledged, there was another occasion -- in fact, we think
11 there were two -- where there was a nationwide problem and a
12 nationwide solution, and that was for toxics. So, we have one
13 thing done that way.

14 Now, one of the issues that was raised, this has to
15 be, you know, this wasn't an analysis of all of the states,
16 and it wasn't Florida particular, so it doesn't count as a
17 determination. And I think there are two documents that
18 address that question. And I regret to say that I scribbled
19 all over one of them, but I did highlight the important parts.
20 It's Administrative Record 19.1, on page 6; and, if I might --

21 THE COURT: As long as everybody else has a copy.

22 MR. GUEST: Yeah, I'm sure.

23 THE COURT: Why don't you put it on the presenter,
24 and then everybody can see it. It's remarkably easy.

25 MR. GUEST: All right. I'm going to have to remember

1 what it says.

2 THE COURT: There is a microphone on the back
3 presenter, and you can speak from there, too, if you wish.

4 MR. GUEST: All right. I'm going to have to read it
5 off of here.

6 What this shows -- this is a 1994 document, which is
7 the genesis of this thing, and what it basically says is that
8 the Congress is entertaining the idea of entering into this
9 field and requiring EPA to develop, you know, numeric nutrient
10 criteria or criteria for nutrients; and that EPA is seeking
11 greater flexibility.

12 And so what that shows, very simply -- I'm sorry.

13 *(Ms. Reimer confers with Mr. Guest.)*

14 That's right. The other item I didn't highlight was
15 that they were talking about having a two-year deadline for
16 doing that, and EPA wanted more flexibility.

17 So, what this document shows is that the genesis of
18 this numeric nutrient criteria thing, was, (a), it was
19 nationwide; and, (b), that in that year, 1994, the concept was
20 this needs to be done quick. That's the genesis.

21 Now -- so that sort of doesn't square with the
22 argument that you have to do that on a state-by-state basis,
23 when you look at that genesis.

24 And further what doesn't square with it is this
25 document -- maybe I can try it on the overhead protector, Your

1 Honor.

2 THE COURT: Sure.

3 MR. GUEST: This is Administrative Record 19.2. It's
4 the front page. This is an appendix to the report. And what
5 this shows is that there was an analysis of all the water
6 quality standards in all of the states.

7 And let's just pull up -- let's use this page, and
8 you look at page 3, and it's got the findings that we would
9 expect to be there, which is that excessive nutrients is this
10 huge problem, and that the national criteria are now only for
11 human health issues and not for the other issues, the
12 beautification issues.

13 And then what we see after that -- we're just going
14 to put one page out that's going to show the Florida standards
15 that are there. There's Region 4, and it has Florida at the
16 bottom there. And it says, narrative.

17 So, the answer, you know, was there a review of the
18 standards all around the country; the answer is, yes, there
19 was. So that goes to the question of whether there was a
20 determination.

21 As was discussed earlier, there is a big distinction
22 between "will" and "might" or "could" or "may" in the future,
23 and it's using, "If you don't, we will." I'm repeating there.

24 Let me turn now to some of the practicality issues
25 that are really the core of the problems here.

1 First, what's happened is that, where the State
2 Department of Environmental Protection has found themselves
3 now is that, where we started out with EPA, in their
4 guidelines, had 14 ecoregions for the United States, two of
5 those ecoregions are Florida, 9 and 12.

6 Now, we are parsing this thing so carefully that now
7 the State DEP has created 41 sub-ecoregions in Florida alone.
8 And this, we submit, is a subset of a delaying strategy. It's
9 just a delaying strategy.

10 And it's a little bit like that, you know, we're
11 saying, we go back to our metaphor in the beginning, is that
12 there needs to be a speed limit sign on the highway. And what
13 we hear now is that we can't do speed limit signs, because we
14 have to have the exact speed limit, and now we've divided
15 Florida highways into 41 subregions for speed limit sign
16 purposes. That looks an awful lot like nothing more than a
17 delay.

18 THE COURT: But we know that by January the 14th, or
19 whatever it is, 2010, we are going to have a speed limit for
20 rivers and whatever; and by the same date in 2011, we're going
21 to have a speed limit for estuaries.

22 MR. GUEST: Well, actually, if that were true, we'd
23 be a lot happier, because what it actually reads on page 9 --
24 maybe I should -- or do y'all have this?

25 THE COURT: I have it.

1 MR. GUEST: Okay. On page 9, it doesn't really give
2 us the date. What it says is expectations, and if you look at
3 the second sentence under EPA's expectations, what it says is,
4 *"EPA will move forward to develop and it will work*
5 *collaboratively,"* and in the next paragraph, in terms of
6 schedule it's, *"EPA anticipates."*

7 THE COURT: Well, yeah, the obligation is to move
8 promptly, and what they've said, we anticipate doing it within
9 12 months, but the state is not driving the bus anymore. EPA
10 now must promulgate standards.

11 MR. GUEST: Absolutely. And, if what this said was
12 EPA will propose by, and EPA will finalize by, then at least
13 you would know what it was, and we would have perhaps a
14 debate -- we probably would have a debate -- on whether that's
15 promptly or not. But this isn't it.

16 These are descriptions that are talking about
17 anticipation and estimates, and that's just a subset of what
18 we've seen all of these years, which is, you know, we're
19 hoping, and this is what we want. And starting after 2000, in
20 the beginning of 2001, that's what you kept getting the whole
21 time was that, you know, we are anticipating this, and then
22 another extension. And this doesn't look like that changes
23 that.

24 So, that's why this really isn't promptly, because it
25 isn't the -- this isn't the deadline date of propose and the

1 deadline of adopt.

2 THE COURT: It seems to me this says what they
3 anticipate. I understand the 12 months in here is perhaps not
4 binding on them, and perhaps it's not prompt, but that's an
5 enforceable standard, too, just not under this complaint,
6 right?

7 MR. GUEST: No, we don't think it is. I mean, we
8 don't think it is. We think, in terms of remedy, a case that
9 we cited to was Sierra Club versus Johnson, an April 2005
10 case, from the District of Columbia, and this was really the
11 same case. EPA has a mandatory duty case under the Clean Air
12 Act, is what it was; and EPA came back and said, "Here's what
13 our expectations are in terms of doing it, getting this
14 mandatory duty fulfilled." Held by the court, "*Expectations*
15 *isn't enough. What you have a right to is deadline.*" Our
16 remedy is say when, and not here's what our expectations are.

17 THE COURT: I don't think the case is technically
18 moot until they give you relief. I think that is correct. I
19 don't understand them to have said that it's technically moot.
20 I think they've said it's practically or it's largely
21 academic. It certainly affects the lay of the case, but it's
22 not technically moot. I think that's right.

23 MR. GUEST: And now the next item --

24 THE COURT: It doesn't necessarily mean the case
25 ought not be stayed, or there ought to be some other way to

1 deal with it, but that's all different, so --

2 MR. GUEST: Well, so, then, the next practical issue
3 that I bring to the court is that -- of course, I think there
4 was a reference to it -- there is an equitable balancing idea
5 in terms of remedy here between the slide in degradation --
6 and we think the record shows that you are really seeing that;
7 that things are getting worse and they are getting worse
8 fast -- and the interest of the government in exactitude. And
9 we think that those things can be balanced, and in the context
10 the balance heavily favors a rapid process.

11 On the issue of the DEP, their process -- I'm just
12 going through practical issues -- what happens is that I think
13 there was an issue about could you do an emergency rule. The
14 case law on that is that there is an extremely exotic
15 abbreviated process for emergency rules under the Florida
16 Administrative Procedures Act. And one of the things is that
17 the agency's previous failure to get their act together can
18 never be an emergency. It has to be a direct -- I think the
19 requirement is that it has to be an immediate threat to public
20 health, safety or welfare of a character that would foreclose
21 ordinary ruling processes, and the emphasis is the emergency
22 concept, an emergency threat to the public.

23 THE COURT: I'm not sure why it matters. If the
24 state doesn't promulgate a rule, then EPA has to.

25 MR. GUEST: Okay. And then to finish that point,

1 very simply, under our Administrative Procedures Act, as I'm
2 sure you know, what happens is, it's not like the Federal
3 Administrative Procedures Act, when the state promulgates a
4 rule, it proposes it; and, if the rule is challenged timely,
5 under Section 120.54, Florida Statutes, it stays the
6 effectiveness of the rule until there's a final order issued.

7 So that means you can put the air brakes on
8 everything by filing a petition. And in these kind of cases,
9 that's what happens. So, that's why we think that -- that's
10 really why we're here.

11 Now, going to the practicality issue about amending
12 the complaint to add a count that you have not done this
13 thing, and it's not promptly, what we think is that you don't
14 really get out of the problem that way. I mean, you can't
15 avoid getting stuck in this issue about the 1998 determination
16 that way.

17 For the reason that is, the question will immediately
18 arise, well, what's the record? Because what I think the
19 United States will say, folks over there would say, is that,
20 well, the record begins with the memorandum from Mr. Luna to
21 the administrator in December of 2008, and you go from there.
22 And what we're going to say is, no, the record begins in 1992
23 and 1994, when the Congress says, "We need to do this thing."

24 THE COURT: Well, look, if what I hear you telling me
25 is, you're not going to amend the complaint; you don't seek to

1 enforce the January letter, that's the end of that question.

2 MR. GUEST: Well, I'm exploring the practicality
3 issues, is what I'm doing. I'm not saying that. I'm just
4 sharing our thoughts and exploring them.

5 THE COURT: I don't need you to explain to me why
6 amending the complaint is not sufficient, or why you don't
7 want to do it. If you're not going to do it, that's the end
8 of the question.

9 I'm pretty sure none of them are going to seek relief
10 under the January '09 letter, if you don't. So, it seems to
11 me, that's fine, you have answered my question.

12 MR. GUEST: Yeah, I think maybe the short answer -- I
13 mean, the shortest answer is that we don't think we can get
14 there that way. That's I think the practical answer.

15 I think in summary, let me turn back to an issue that
16 was raised, is that how do you tell whether a thing like this,
17 whether a document like this, represents determination?

18 There was a suggestion in the United States's
19 response that you can look into the -- you can look by analogy
20 to the factors that are examined in whether this is a rule
21 under the Administrative Procedures Act. And some of those
22 things, you know, have some relevance, some of them don't.

23 One of them is -- one factor is whether the statement
24 by the agency is framed in mandatory terms. We say it meets
25 that part of the test, because it says, "If you don't, we

1 will," and it doesn't say, "If you don't, we might." It says,
2 "If you don't, we will."

3 Two is that it was published in the Federal Register
4 with a notice and with a hotlink, and we think putting a
5 hotlink in there means that it's in the Federal Register as an
6 attachment, just like it would be an attachment to anything
7 else. A hotlink is an electronic attachment. So, we think
8 it's in the Federal Register.

9 The other factors were -- well, does it have a
10 binding effect on the agency? Well, that's the ultimate
11 question in this case, and you can't really use that factor.

12 And then, lastly, what is the full context of the
13 circumstances before and after? And what we submit, in
14 summary, is that, if you examine the full context, that what
15 you see is that this had its genesis in a congressional threat
16 to require, in a very short fuse, nutrient standards for the
17 United States, because this is a growing problem, and it was a
18 long time ago. EPA sought flexibility and warded that off
19 by --

20 THE COURT: That probably took care of itself after
21 the November '94 election, didn't it?

22 MR. GUEST: That's probably true. Well, actually the
23 document was -- yeah, the document -- it's December '94.

24 THE COURT: The new Congress took office in January.

25 MR. GUEST: It took care of itself.

1 But that said, EPA went forward with it as a national
2 item, and progressed through findings that that is a national
3 problem, and they did something very much like the toxics
4 rule, when they got to the point where, you know, congealed
5 into action, it became a key action item -- in fact, they put
6 it in the report to the Vice President -- without any
7 equivocation about this doesn't create rights or anything.
8 And in the end, how it got implemented, how it was
9 characterized by the folks that were implementing it on the
10 ground, by Ed Decker, the nutrient coordinator, was it has
11 deadlines. Their conception of this was this was a mandate.

12 So, if you look at the full context of it all, too,
13 that weighs, we submit, heavily in favor of an interpretation
14 that this was a determination.

15 And so we talked before about the interplay of
16 303(c) (4) (A) and 303(c) (4) (B) .

17 So, we think that, when you use that analogy to the
18 rule, the question, was this a rule or not, on the ones that
19 actually make any sense to apply, the answer is, they weighed
20 in favor of a finding that this was a determination.

21 THE COURT: All right.

22 MR. GUEST: As to remedy, we have asked for a
23 particular remedy. We think, of course, that the court could
24 find summary judgment as to liability, and then have further
25 proceedings. As a practical matter, what is going to happen,

1 if you do that, is that we're going to have endless expert
2 witnesses and discovery from the district; and they are going
3 to be coming from DEP, explaining why we have to have 41
4 ecoregions, et cetera. We think there is sufficient evidence
5 in the record by which to form -- frame a remedy.

6 THE COURT: All right.

7 I will get you a decision. This is one where I think
8 I owe it to all of you, and perhaps to the circuit, to write
9 it down with some care. In addition, this is one where this
10 is the kind of case where it helps to write it down with some
11 care and make sure it's analyzed correctly. So, I'm going to
12 do that.

13 I would like to promise you I'll have a very prompt
14 decision. I can tell you, you are not first on the list, but
15 I will try to get to it fairly promptly. So, it shouldn't be
16 too long. But when I make promises, I always live to regret
17 them. I'll do my best.

18 I do appreciate the help. Y'all have helped me, and
19 I appreciate that.

20 Ms. Mann, you're trying to say something?

21 MS. MANN: I just wanted to make a couple of
22 clarifications, if I could, Your Honor. I know that -- may I
23 approach the podium?

24 THE COURT: You can.

25 MS. MANN: I will be very brief.

1 I did want to point out to the court, Mr. Guest
2 referenced the Clean Water Act, Judicial Review Provision of
3 509(b)(1)(E). As I read the statute, the 509(b)(1) discusses
4 which cases go to the circuit court, and anything that doesn't
5 fall into the laundry list of 509(b)(1), goes to district
6 court. So, I wanted to make sure the court understood that.

7 Second, I wanted to point out to the court that, when
8 citing to Administrative Record, Section 119.2, Mr. Guest put
9 up what is a summary of what states' standards were in place;
10 there is no review or analysis of those standards.

11 And, finally, I wanted to state to the court that,
12 I'm not sure I followed all of his discussion of the
13 imperative language case law, but I did want to point out that
14 there was no response to EPA's argument on that in the
15 plaintiffs' brief, and the plaintiffs' cases that they all
16 cited as to imperative language, all discuss either statute or
17 regulatory language, not language in a policy document like
18 the Water Action Plan.

19 And that's all I had.

20 THE COURT: I understand. "Shall" and "will" are not
21 nearly so unambiguous as people sometimes think. That's why
22 we changed all of the rules so they don't say "shall" or
23 "will"; they say "must." Probably has nothing to do with this
24 case.

25 Again, thank you all. I appreciate the input. I'll

1 get you something as quickly as I can.

2 (The proceedings adjourned at 1:24 p.m.)

3 * * * * *

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6 I certify that the foregoing is a correct transcript from the
7 record of proceedings in the above-entitled matter. Any
8 redaction of personal data identifiers pursuant to the
Judicial Conference Policy on Privacy are noted within the
transcript.

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Judy A. Nolton, RMR
Official U.S. Court Reporter

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4/5/2009
Date